

DOCKET NO. 2000-366-A - ORDER NO. 2002-345

IN RE: Application of Chem-Nuclear Systems, LLC) ORDER DENYING *va*
for Approval of Allowable Costs.) MOTION TO STRIKE OR
) IN THE ALTERNATIVE
) FOR A SCHEDULING
) ORDER

On January 9, 2002, this Commission ordered the Company and the Staff to file certain late-filed exhibits related to the allowance of certain costs, including Barnwell Operating Rights. This Commission ordered both the Company and the Staff to file and serve those exhibits by February 11, 2002. This Commission ordered the statutory parties and intervenors to respond to those exhibits by February 28, 2002. On March 1, 2002, this Commission entered an Order granting the Board's Motion for an extension of time

to respond to the late-filed exhibits until April 26, 2002. That Order recognized that additional time was needed due to the voluminousness of the late-filed Exhibit and because the Applicant had identified several potential expert witnesses in Hearing Exhibit 11.

According to the Board, since the entry of the Order, at the time of the Motion, Chem-Nuclear has produced four of the witnesses identified in Hearing Exhibit 11 for depositions, and six depositions remain to be taken. The Board states that, despite various overtures, the Company has not identified any dates on which the remaining depositions can be scheduled. The deadline for the parties and intervenors to respond to the late-filed hearing exhibits was April 26, 2002. Notices of depositions of the remaining witnesses were served, but, according to the Board, Chem-Nuclear's counsel then represented that he was not authorized to accept service of the deposition notices and that the depositions likely would not proceed as noticed. Accordingly, the Board moves that this Commission strike the reports, documents and/or opinions included in Hearing Exhibit 11 that are authored, reviewed, and/or signed by the six specified individuals. In the alternative, the Board requests that the Commission enter a scheduling Order, requiring the Applicant to produce the specified individuals for depositions by May 10, 2002, and extending the time for responding to the late-filed exhibits of the Company and Staff until June 10, 2002.

Chem-Nuclear submitted a Return to the Motion. The Company noted that none of the six individuals noted are employees of Chem-Nuclear and Chem-Nuclear is not in a position to control their schedules for the conduct of discovery, or for any other reason.

Chem-Nuclear states that it has, however, attempted in good faith to cooperate to arrange suitable dates for the depositions.

Chem-Nuclear takes issue with several matters stated by the Board. For instance, the Company states that since neither counsel for Chem-Nuclear nor Chem-Nuclear was aware of the intended deponents' availability, it was not possible for counsel at Chem-Nuclear to know whether it was likely or unlikely that the depositions would proceed as the Board had noticed them. Further, Chem-Nuclear states that it has not refused to make the noted persons available for depositions. The Company states that it has attempted to assist in the arrangements for scheduling the depositions, but that the individuals have simply not been available when the Board wanted to depose them.

Further, Chem-Nuclear states that any prejudice suffered by the Board by its inability to take the requested depositions is minimal, since any hearing that the Commission may hold will be preceded by a prefilings of testimony and exhibits of any witnesses that may be called.

In addition, the Company notes that any extension beyond the date of April 26, 2002 for the responses to Hearing Exhibit 11 would create the possibility that this proceeding would extend into a subsequent proceeding to address the identification of allowable costs for the fiscal year 2002-03, pursuant to S.C. Code Ann. Section 48-46-60(B)(4) (Supp. 2001).

Finally, Chem-Nuclear states that the Board has not provided any justifiable reason to support a decision to strike those portions of Hearing Exhibit 11 which its


Motion identifies. The Company asks that the Motion and the alternative request be denied.

We agree with Chem-Nuclear. First, since none of the individuals to be deposed are employees of Chem-Nuclear, we do not see how Chem-Nuclear can be expected to control the scheduling of depositions of those individuals. It appears that Chem-Nuclear has attempted to aid in this process, however. Further, we do not think that the Board has suffered any prejudice by its inability to depose the requested individuals. It is a truism that this Commission will enter a scheduling Order prior to any supplemental hearing which will require the parties to prefile testimony and exhibits. Thus, the Board will learn what the potential witnesses will say well in advance of the supplemental hearing, if any. Of course, the Board will have the right of cross-examination during any hearing that may be held.

In addition, we agree with Chem-Nuclear when it states that any extension beyond the date of April 26, 2002 for the responses to Hearing Exhibit 11 would create the possibility that this proceeding would extend into a subsequent proceeding to address the identification of allowable costs for the fiscal year 2002-03. We do not intend to create that possibility. We also agree with the Company when it says that the Board has not provided any justifiable reason to support a decision to strike those portions of Hearing Exhibit 11 which its Motion identifies.

Accordingly, for the above-stated reasons, the Motion of the Board and the alternative relief sought are hereby denied. This Order shall remain in full force and effect until further Order of the Commission.

BY ORDER OF THE COMMISSION:


Chairman

ATTEST:


Executive Director

(SEAL)